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# Introduction: Cultural rights and constitutional change

Lotte Hughes and Mark Lamont

The Open University

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Culture, and its bedfellow cultural rights, are fast becoming ubiquitous global concepts and rallying cries in today's world. If the second half of the 20<sup>th</sup> century saw the ascendancy of universal human rights, as this century unfolds we are witnessing the relentless rise of cultural rights in law, policy, rhetoric, and everyday practice. Some of the reasons for this flourishing (such as the concomitant explosion in identity politics, and a growing culture of entitlement) will be discussed in this Special Issue, primarily with regard to Kenya, whose new (2010) constitutional cultural rights provisions provide a useful case study whose implications go way beyond that country. Many of the articles share an analytical framework of governmentality and citizenship, linked to culture, rights and constitutionalism, which has applications across the continent.

This Special Issue is the main written output of the ESRC-funded research project 'Cultural rights and Kenya's new constitution', which was based from 1 September 2014 to 30 September 2017 at The Open University, UK.<sup>1</sup> Core articles by members of this interdisciplinary research team are complemented by contributions from other scholars and practitioners who bring fresh and exciting perspectives that are largely, like ours, based on new empirical research. These other perspectives look beyond Kenya in some cases (for example Harriet Deacon; Jérémie Gilbert & Kanyinke Sena; Celia Nyamweru & Tsawemunga Chidongo; and Yash Ghai), and we believe the insights and analysis expressed in these pages can be applied more broadly to other countries in Africa and beyond.

The team set out to examine and analyse the different ways in which Kenyans are engaging with culture and exercising their cultural rights, following the promulgation in 2010, following a public referendum, of a new constitution which enshrined such rights for the first time (see Deacon; and Ghai in this Special Issue). These rights included, for example, rights to ancestral land, cultural expression, protection for traditional knowledge, endangered languages and intellectual property, promotion of alternative forms of dispute resolution, and simply the right to 'enjoy' one's culture. At the same time, the constitution outlawed harmful cultural practices, without naming any. In the event of a clash between cultural rights and human rights, it was clear (though maybe not entirely so to all citizens) that the constitution would trump 'tradition'. It also allowed for the devolution of governance to 47 new county governments which have, since 2013, been extremely active in promoting and employing culture for economic, political and other ends.<sup>2</sup> This

latter process has not been unproblematic, and has for instance reflected local and globalised tensions between cultural particularity and liberal democracy.

## Kenya's new constitution

The Constitution of Kenya 2010 (CoK) was the product of mounting internal and external pressure for reform, and was hailed as marking the 'rebirth' of the nation (see Deacon; and Ghai in this Special Issue). Demands for a new constitution were accelerated after the 2007/08 post-election violence (commonly abbreviated to the PEV), and became a central plank of the National Peace Accord brokered by Kofi Annan in February 2008.<sup>3</sup> It was, therefore, regarded as an important vehicle for enabling and contributing to social cohesion, national unification and post-conflict peace-building. However, from the start of our research we foresaw potential problems ahead with regard to culture (or notions thereof), and associated issues. These included the likelihood of a clash between cultural and human rights in certain circumstances (for example conflict over women's property rights, responses to gender violence, the reification of and challenges to male traditional authority); and the possibility that demands for differential treatment and the 'fostering of particularity' could contend with the principle of equal respect and treatment. Following devolution in 2013, which the constitution enabled, there was also a distinct risk of a retreat by citizens into mono-ethnic enclaves, the reification of 'tribe' and ethnic 'difference', and the hardening of ethnicised socio-territorial boundaries. Some of this has come to pass, and is discussed in these pages. On the plus side, developments since 2010 have signalled that the potential exists to put Kenya on a trajectory towards a more pluralistic society; devolution has led to more citizen participation and engagement in governance processes (a constitutional requirement); and the performance of culture has become a more public, democratic and inclusive practice than it was in the past (Hughes, Akoth & Nyamweru 2017). Indeed, culture has become ubiquitous in public and political life, though not necessarily for entirely positive reasons. In response to the new constitutional recognition of culture, it has also fed into community-based activism, particularly among minorities and indigenous peoples, and also those communities adversely impacted by infrastructural and other large-scale development projects (studied by former team member Zoe Cormack, see Cormack & Kurewa 2018). Cultural activism is effective in promoting holistic ideas of community that wins support and respectability among defenders of pluralism and diversity. In such activism, culture works through information technologies, the constitution and transnational law to make new linkages between local community-based organisations (CBOs) and social movement activists, connections that are recognisable elsewhere in the world (Merry 2006).

We believe that constitutional change in Kenya (and elsewhere) offers an important prism through which to analyse the uses of culture by the state, civil society, and other actors including county or other federal governments. This is partly because the passing of a new constitution, and the often protracted public review process that leads up to this, marks an important new beginning in the life of a nation, and (ideally) offers citizens the chance to review individual and collective values, identities, their sense of belonging, legislative frameworks and institutions, and to get directly involved in implementation – helping to make a constitution work. In the Kenyan case the new constitution 'recognises

culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation' (Article 11(1)). This has prompted citizens to reconsider their relationship to both culture and nation, though maybe not as much as its drafters had hoped. Apart from this reference to national foundations, the document curiously fails to define the term 'culture'. Another way of reading this, however, is to see part of the work of culture as bracketing emergent issues and conflicts in such a way as to keep them deliberately ambivalent for the purposes of regulation (one example being debates around the practice of male and female circumcision, see the articles by Mark Lamont and Lotte Hughes in this Special Issue.)

## A very brief summary of Kenyan constitutional history

The 1963 independence constitution was 'intended to represent a radical departure from the colonial, executive dominated, highly centralized system of government, without any guarantees of human rights' (Ghai & Ghai 2011: 9).<sup>4</sup> Most importantly it was negotiated, albeit under British auspices, unlike previous colonial constitutions which were imposed on the Kenya colony by the British. This constitution is sometimes referred to as the *majimbo* constitution, which can be broadly translated as regionalism. Smaller ethnic groups feared being swallowed up by the larger groups, once the colonisers had left, and demanded constitutional protection and a share of state power. They formed a new political party, the Kenya African Democratic Union (KADU), in order to press for these rights. Under this constitution, seven regional governments replaced the 41 old provinces.

But the 1963 constitution was short-lived. The first independence prime minister, Jomo Kenyatta, who was soon to become president, sought more power and set about dismantling the constitution via a series of amendments. The system of governance was changed from parliamentary to presidential, and from monarchy (with the Queen represented by a governor-general) and Kenyatta 'changed or removed most of the provisions of the constitution directed at democracy, power sharing and human rights' (Ghai & Ghai: 10). The regional governments, so prized by KADU, were swept away, so was the senate; power now lay in the hands of a highly centralised national government, and the president. KADU dissolved and merged with the dominant party, the Kenya African National Union (KANU), in 1964. As a result of a limited constitutional review in 1982, and the efforts of second president, Daniel Arap Moi, Kenya changed from a one-party state in practice to a legally one-party state. Moi continued Kenyatta's work in rushing through constitutional amendments, destroying fundamental rights and freedoms, and undermining the judiciary. By 1988 a new document was in place – called an 'amendment', but in reality a new constitution. But by the early 1990s, reforms had become inevitable. The one-party system constitutional provisions were repealed in 1991, and multi-party elections held the following year. To jump ahead, parliament passed the Constitution of Kenya Review Act 2000, which created the legal framework for comprehensive reforms with the support of all political parties (but not that of civil groups). Constitutional review was to take another ten years, with many vicissitudes, until the current constitution was approved in a national referendum in August 2010. Surprisingly, it reproduced about 80 per cent of the draft adopted by a constituent assembly and parliament in 2004.

In the next section we will return to the subject of culture and cultural rights.

## The ascendancy of culture and cultural rights

Culture has burst back onto the geopolitical scene of the 21<sup>st</sup> century, hotter and more problematic than ever, despite its premature rejection by the postmodern luminaries of the 1980s. Equally misleading ideas, such as the McDonaldization of the world, goad social theorists to do some hard thinking about their projections and, ultimately, the work of culture in the contemporary world. Loosed from its academic handlers, particularly anthropologists, culture is now pursued vigorously with legal prowess throughout the world, by minorities and majorities alike, in the form of claims to entitlement laid upon rapidly emerging cultural rights. Are we witnessing the dawn of a new assertion of ethnicity within the rule of supranational law as envisioned in Carl Schmitt's *Nomos of the Earth* (2003) and echoing the nationalism of the 1930s? Or is this the moment when the seemingly unrelenting progression of liberal human rights regimes fragment into the myriad communal interests of *Ethnicity, Inc.* (Comaroff & Comaroff 2009), driven by the desire to marketise identity and culture?

The advent of cultural rights captures prevalent socio-political moods of the contemporary world, and these jural and rights processes come about as a result of many inter-related factors. One is certainly the rise of the international indigenous peoples' rights movement (see Gilbert & Sena in this Special Issue), which has in turn produced a globalised culture of collective assertion and claim-making that is rooted in the drafting of bio-cultural protocols which resemble a kind of 'strategic essentialism' (Spivak 1996). Moreover, the gargantuan growth of online activism offers unparalleled scope for cross-cultural communication, and the mobilisation of groups and individuals seeking recognition, justice, compensation and other types of gain – a form of digital citizenship which also enables the re-articulation of the local to the global and often completely cuts out the nation state, or remains hostile to censorship and patrimonial guardianship. Other factors, which connect to some of the above, include the veritable explosion in recent decades of the politics of identity, recognition and belonging (for example Appiah 1992, 1994; Taylor 1992, 1994; Geschiere 2009; Englund & Nyamnjoh 2004), which link in turn to trends towards multiculturalism, pluralism and cultural diversity (for example Appiah 1994; Guttman 1994; Taylor 1992, 1994). As Amy Gutmann notes:

Questions concerning whether and how cultural groups should be recognized in politics are among the most salient and vexing on the political agenda of many democratic and democratizing societies today. (1994: 5)

The emergence of cultural rights comes at a time of global neo-constitutionalism, ushering in partial re-orderings of the system of nation states shaped through the tumult, violence, and speed of the 19<sup>th</sup> and 20<sup>th</sup> centuries. Wherever these rights processes are taking root – from Canada's reconciliation with First Nations to the veto-power of microstates like Liechtenstein within the European Union – the sovereignty of the nation state is more apparent than real, giving rise to new ways of looking at state power. Rights processes are normatively framed as ensuring that the rule of law within a state protects its citizens from the potential harm and violence of state power. It is against the backdrop of the nation state's exceptional use of violence against its own citizens that human rights emerged, first abstractly in the wake of the Holocaust, then more concretely as the ideological currents of the Cold War slowed and stalled. In historical parallel with the growth of human rights

concerns since the 1970s, the prime movers of cultural rights tend to be those seeking to circumvent the power of the state, who advocate for a radical extension of the judicial domain beyond the national, looking to minority custom and supranational law for sources of new jural and political authority. As identities are increasingly divided within the borders of the nation state, many countries' internal boundaries are undergoing schismogenesis, revealing a new ethno-spatialisation of the nation state, reminiscent of older worlds, yet very much produced by contemporary geopolitics.

Across Africa – especially in postcolonial states – the ascendancy of or renewed interest in culture and cultural rights since the 1990s may also be read as part of an ongoing process of casting off the colonial yoke, the rise of multipartyism and the widening of democratic space, an expressed desire for a return to 'authenticity', and the reaffirmation or reclamation of African beliefs, values, practices and histories, most particularly by subaltern and marginalised civil society actors. Some of these actors have long called for the 'preservation' of 'our culture' in the face of perceived threats from globalisation, immigration, multiculturalism and modernity – an anxiety not confined to Africa. Most scholars would maintain that culture is a social construct that is and always has been fluid and in constant flux, shaped and reshaped over time by internal and external influences, and endlessly derivative of earlier cultural form and expression.

As Jean Comaroff and John Comaroff have written of ethnicity, 'there is a lot of it about these days'. One could easily substitute the word 'culture' for the rest of that sentence – 'a lot of ethnic awareness, ethnic assertion, ethnic sentiment, ethno-talk; this despite the fact that it was supposed to wither away with the rise of modernity' (Comaroff & Comaroff 2009: 1). Kenya was meant to have moved beyond ethno-talk, too – not least because ethnicised hate speech has been banned by two Acts of parliament.<sup>5</sup> We posit that 'culture' has come to stand in for ethnicity and tribalism in contexts where it is no longer politically correct or safe to speak openly about 'tribe', especially in the wake of ethnicised violence such as that which engulfed Kenya in 2007/08. Culture (or notions thereof) arguably make certain subjects or issues respectable that might otherwise spark protest or outrage; for example, the politicisation of and use by political elites of mono-ethnic councils of elders; misogyny; discrimination against women, the LGBTI community, and anyone deemed to be 'other'; and gender violence including that involving male and female genital mutilation or cutting.

## The relationship between cultural rights and human rights

Cultural rights are nested within a wider jural foundation of human rights, but have often been regarded as inferior and underdeveloped in comparison to other rights (for example Shaheed 2010; Belder & Porsdam 2017). Farida Shaheed, formerly the United Nations Special Rapporteur in the field of cultural rights, argues they are in many respects 'pivotal to the recognition and respect of human dignity, as they protect the development and expression of various world visions – individual and collective – and encompass important freedoms relating to matters of identity' (2010: 3–4). However, the lesser standing of cultural rights has changed in recent years, partly as a result of lobbying by indigenous and minority rights groups which have successfully promoted the idea that culture is indivisible from their humanity, dignity and self-realisation, and lies at the very core of life itself (see Gilbert & Sena in this Special Issue). Moreover, the ways in which culture is

treated in international bodies has shifted markedly from concerns about the protection of cultural heritage properties such as buildings and landscapes, and their 'universal value' to humanity as a whole, to a recognition that culture has intrinsic value for specific groups of people. There has also been a distinct shift over time in international law from a focus on individual rights and national culture, to minority group rights and cultural diversity (Kymlycka 1995; Taylor 1992; Tully 1995). Simultaneously, growing intellectual debate has centred on vexed issues around cultural relativism versus universalism (for example Taylor 1994; Gutmann 1994; and other essays in that collection).

In global constitutional terms, provision for the right to culture was mentioned in just over a tenth of surveyed constitutions in 1946, but by 2006 was mentioned in nearly half of all constitutions (Goderis & Versteeg 2014 cited in Deacon 2016: 7; also Deacon in this Special Issue). Simultaneously, over time culture and cultural rights (especially recognition of the importance of diversity) have come to be seen as crucial to national and international peace, social cohesion and development. This is exemplified for example in the UNESCO Universal Declaration on Cultural Diversity, which states 'respect for the diversity of cultures, tolerance, dialogue and cooperation, in a climate of mutual trust and understanding are among the best guarantees of international peace and security'.<sup>6</sup> In 2008, the UN declared culture one of six cross-cutting themes of the UN agenda, on the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights (1948).<sup>7</sup> The choice of culture was explained as:

The concept of Human Rights is bound closely to the belief that culture is precious and central to our identity. The way we are born, live and die is affected by the culture to which we belong, so to take away our cultural heritage is to deny us our identity. At the same time, we can all benefit from the experience of other cultures and we have something to offer them in return.<sup>8</sup>

The underlying confidence in culture, as a universal value, implied in this statement should be questioned. Within the complex framework of the 'strange multiplicities' of contemporary pluralism and the historical consequences of globalisation, the idea that human beings only 'belong' to one culture, excludes the fact that positive exchanges exist between different cultural communities (sometimes, not always). In a globalised world characterised by migration, displacement, mixing and intermingling, many people increasingly identify with several cultures simultaneously, and may choose to reject their birth culture (if indeed that was mono-cultural in the first place) in favour of identification with a cultural melange – or an identity that does not rest upon conventional notions of culture at all. Contemporary notions of rights pivot upon such an axiom about freedom of choice and consciousness, which can be in tension with the idea of cultural rights invested in a singular community or group.

In the next section, we will turn more specifically to Kenyan culture.

## Culture, Kenya style

To speak of 'Kenyan culture' may appear paradoxical in a country that officially counts some 44 different ethnicities ('tribes') yet in the more tacit sense Kenyans do have a national public culture.<sup>9</sup> In tracing debates about culture in the Kenya National Assembly or parliament, it is clear that Kenyan politicians are shrewdly aware of the moral evaluations and regimes of value through which 'African' culture must pass, whether this be the cultural intimacy of ethnic jokes, the communal pleasures of *nyama choma* (roasted

meat, pretty much the national dish), or stereotypical images of ‘Maasai on the Lawn’ (Bruner & Kirshenblatt-Gimblett 1994; Myers 2001). Yet, a national culture is also still formative in this relatively young nation state that recently celebrated its 50<sup>th</sup> anniversary of political independence. When the government proposed in 2004 to create a national dress for men and women, and a national competition was launched to find it, the outcome was largely received with derision by Kenyans.<sup>10</sup> What, then, *is* Kenyan culture? Like many other postcolonial African countries, Kenyans’ search for a national culture is defined, in part, by what it is not, rather than positively by what it is. It exists, but only in the interstices of other regimes of value, some linguistic and performative, others material and plastic. One need only recall the Zaïrean experiment with *l’authenticité* to grasp the ideological need for an African identity to emerge from the ashes of Europe’s cultural imperialism. A deep ambivalence runs through Kenya’s national culture, often expressed in sardonic humour. In 1989, for example, a member of parliament warned against the bricolage of Kenyan public culture, particularly that on sale to tourists, by arguing: ‘We should not just open a market of cultures because we might just get cultural sewage.’<sup>11</sup> Most Kenyans know tacitly what this national culture entails, yet they reserve it for special occasions, just as they have also learned where and when to perform ethnicity. Cultural festivals have been supported by the state since independence and, within secondary schools, there is an active education in performance and drama that bears strong family resemblances to what can be experienced at Bomas of Kenya (a state-owned national heritage site established in 1971; see Hughes 2014: 191–3; Bruner 2005), and in many tourist lodges, for that matter.<sup>12</sup> The Carnivore, a major Nairobi restaurant and events centre, was the venue for popular ‘Luo Nights’, ‘Gikuyu Nights’ and ‘Kalenjin Nights’, showcasing music and dance in the vernacular. These appear to have been held less frequently since devolution.

The devolved governance ushered in by the CoK breathed new licence into the concept of culture. Although various ministries had made provision for culture and cultural performance, ever since the colonial period, in the past five years the concept of ethnic over national culture has been revisioned. Culture has emerged from the quaint touch of church or secondary school performances, rebranded by glossy, professional marketing for a new marketplace defined by catchwords like co-existence and sustainable heritage. Across the 47 counties, cultural festivals are big business. Following the money trail, a picture emerges of the growing expansion of culture as a complex vehicle for social mobilisation and the creation of new kinds of publics within Kenya.

In the certainty that Kenyan culture-talk emerges out of a global neo-constitutionalism and the wedding of this process to neoliberal marketisation, these articles demonstrate how culture is being used within a new jural charter for pluralism in Africa. The articles on Kenya also report from the ground, and show that the very rights processes that the CoK sought to augment, bringing them closer to the people, have produced new communities of argument that test the limits of rights law, encouraging some forms of culture, while criminalising others.

## Overview of articles

Deacon provides vital contextualisation on the constitutional aspects of our theme, exploring cultural rights provisions in the CoK in comparison with those in other constitutions. She concludes that ‘culture’ means several different things in the CoK, and that the



document borrows from a wide range of constitutional texts in Africa and elsewhere. A key observation is that the CoK 'supports a rather "vanilla" notion of democratic national culture and values at the national level in an effort to reduce politicisation of ethnicity and implement human rights principles'. Some Kenyans, who complain that the CoK does not go far enough in championing 'traditional' cultures in the plural, might have preferred more technicolour than vanilla. Whether or not these efforts have succeeded should become evident in some of the articles that follow (for example Josse-Durand). Deacon notes that the CoK on the one hand protects the rights of individuals to participate in the cultural life of their choice, but on the other offers some protection to those vulnerable to harmful cultural practices – a theme picked up in discussions of gender violence associated with ritualised female and male circumcision (Lamont; Hughes). Overall, we have found Deacon's observation that culture 'performs several different kinds of *work*', both in the CoK and society as a whole, to be tremendously helpful (emphasis added).

Steve Ouma Akoth's article discusses examples of the work that culture is doing in Kenya today at the level of community land rights. Through case studies, he examines how the CoK has 'made visible' the connection between land and culture, a link local claimants have exploited in litigation, brought against a controversial commercial farm, that invokes citizens' constitutional cultural rights. In these legal processes, it becomes clear that claimants are rehearsing and re-enacting concepts of belonging and Luoland – concepts entangled with vital matters of gender, culture and kinship that do not necessarily sit well with the concept of land as mere property. At the heart of Akoth's research in Siaya County are complex struggles in and out of courts to reconfigure land as culture. Akoth analyses conflicts between individual women and patriarchal clans over the right to dwell in and use land, as well as over various kinds of 'tenancy' exercised between county governments, foreign agribusiness, and CBOs. Akoth invites us to consider how new constitutional possibilities lead to the objectification of land as culture, provoking novel ways to legally challenge the fixity of land surveys and individual title on behalf of communities, although almost exclusively in the name of patriarchal elders.

The embeddedness of culture in land and natural resources is explored from a different and more legalistic perspective by Gilbert and Sena, who compare litigated claims brought by indigenous peoples in Kenya and Uganda to secure their rights to ancestral lands. They place these claims in the context of the international legal framework, legal norms and emergence of a 'robust jurisprudence' concerning the rights of indigenous peoples. The authors argue that the right to cultural integrity offers a useful legal approach for indigenous rights claims, not only in these two countries but across Africa. While this particular right is not yet contained in any international human rights treaties, it refers to a bundle of different human rights such as rights to culture, subsistence, livelihood, religion and heritage. It is this all-encompassing characteristic, including elements regarded by indigenous peoples as fundamental to their cultural heritage, such as spiritual ties to territory, which (the authors assert) offers a promising and more holistic way forward than is currently available to litigants. Through case studies of Kenya and Uganda, they describe the ways in which new legal avenues could be used to challenge the dominant cultural and developmental agenda imposed by states' authorities.

John Harrington's contribution further develops the theme of international legal frameworks with respect to the regulation of traditional medicine and its practitioners who operate in the shadows of state governmentality, but exercise considerable, if still

unmeasured influence over issues of health and safety, sovereignty and development. The CoK is invoked on the grounds of accessible and affordable healthcare provision as a right, as well as the categorisation of many traditional forms of healing as intellectual property, a matter of considerable importance to indigenous communities in Africa, some of whom have unwillingly been exploited by biopiracy. Following the complex development of various legislation aimed at introducing new forms of governance and regulation over traditional healers and indigenous therapeutics, Harrington's article highlights the important new impetus that the CoK provides for the development of Kenya's intellectual property regime, particularly on matters of health and well-being. Harrington concludes that the state's primary responsibility in this new dawn of the rule of law is to interrupt the disorderly and unproductive 'resource grab' of intellectual property (IP) piracy with lawful systems for the orderly integration of traditional medicine into national healthcare and the global economy.

The integration of informal traditional practices – in this case, alternative dispute resolution mechanisms that offer a form of affordable and accessible governance to citizens – and formal, national legal frameworks – is echoed in Nyamweru and Chidongo's article on the changing role of Kenya's revamped Councils of Elders (CoE). Drawing on case studies, historical antecedents, and referring where relevant to other African countries where some form of traditional authority still exists within the nation state, these authors examine the contributions made by CoE to alternative dispute resolution. They also ask, how relevant are CoEs and elders (whose authority had been predicted to wane) to governance and politics in Kenya today? Such councils are rooted in precolonial Kenya's acephalous and gerontocratic polities, but have evolved in response to new socio-legal and political opportunities. The authors describe their role in national election campaigns where voting is still influenced by ethnic division and clan politics. Though such institutions have limited formal authority, they still exercise extensive jural authority over what really matters to a large swathe of the country's population, especially in rural areas, and in the realm of kinship, domestic disputes, rights to land and environmental conservation. Rather than seeing these CoE as the quaint enclaves of ethnic power, the authors show how they fit into new patterns of alternative or soft power made possible through the creative application of the CoK to everyday matters.

Elders also feature to a lesser extent in the reinvention and restoration of Nandi culture and alleged 'past glory', discussed by Chloe Josse-Durand. Her broader theme is community museums and their role in the construction and memorialisation of historical Kenyan figures as heroes and heroines, also the role of cultural entrepreneurs in that process. The pivotal 'heroic' character in her study is Koitalel arap Samoei, a Nandi prophet murdered by a British soldier in 1905, in whose name a museum and mausoleum were created in 2007. The government and political kingpins embraced this grassroots initiative with enthusiasm (unusually, since the state tends to regard non-state museums with suspicion) – but there were clear political reasons for that, linked to state efforts to identify and champion national heroes, broaden the range of heroes beyond Mau Mau and Kikuyu, and the run-up to the tumultuous general election in December 2007. Koitalel's legacy continues to be used to advance the political ambitions of individuals, at both local and national level. Josse-Durand shows how cultural discourses activated by the CoK are reactivating historical grievances over land and other types of loss. She argues that culture is being used as a guise for narratives of suffering, autochthony and land claims, and Koitalel's reification is central to the reinvention of the identity of a marginal community.

As mentioned earlier, harmful cultural practices that are nonetheless valued as 'traditional cultural heritage' and a 'moral good' by some communities pose one of the toughest challenges in this discussion, and for constitutional change predicated upon liberal rights regimes. Cultural rights intertwine with human rights in certain social spaces, and are not as easy to separate as one might imagine. In the course of Hughes' research she heard female genital mutilation or cutting (FGM/FGC) defended as 'a badge of identity' and a 'woman's right', with indigenous women angrily claiming it has nothing to do with patriarchal norms.<sup>13</sup> On the contrary, some see it as conferring social status on marginalised women. Male gender violence (MGV) around ritual initiation, meanwhile, tends not to be regarded as violence at all, nor a human rights violation, even when forced by mobs on uncircumcised adult males in public – a long-standing phenomenon in Kenya (see Lamont's article). These articles complement one another, not least because we need to ask ourselves: why does FGM/FGC provoke an international outcry and moral panic, manifested in 'zero tolerance' campaigns aimed at its eradication, while forced male circumcision does not?

Hughes does not focus on FGM/FGC so much as the relatively new and under-researched phenomenon of Alternative Rites of Passage (ARP), touted by non-governmental organisations (NGOs) as an alternative to girls' initiation into womanhood but without 'the cut'. International donors love ARP, because it appears to offer a quick transformative fix and ticks key development boxes. But is it as 'harmless' as its proponents claim, or do heavily engineered social interventions of this kind invariably produce unexpected consequences? Hughes argues that both the instruction and ceremonial components constitute cultural performance, not just the elements labelled 'cultural'. The entire cultural assemblage may be read as an invented tradition in which notions of culture, pastness and modernity are mixed in a fascinating hybrid. She highlights the important if sometimes problematic role of Christian faith leaders in these rituals, which tends not to be regarded as 'cultural' by local players who valorise culture as something ethnicized, unchanging and primordial.

In his discussion of forced male circumcision and the politics of foreskin, Lamont asks whether the ambivalence of the public and security forces towards this kind of violence as violence sits awkwardly with the vision for the expansion of rights and protections under the CoK. He shows how human rights accorded to the individual can be challenged by assertions of cultural rights exercised by groups – often featuring acts of public violence that many Kenyans accept as culturally sanctioned acts of discipline. Yet male circumcision is only rarely questioned and, indeed, is being actively encouraged by various government offices, county councils, and international organisations. Tens of thousands if not millions of male youths actively desire circumcision as a means by which to organise themselves as men, secure cultural belonging, and confirm their social authority. At the same time, mass public health campaigns promote voluntary medical male circumcision in non-cutting parts of the country, further legitimising the cut as an active part of national or medical citizenship that parallels the moral ethnicity of circumcision. This article demonstrates the potential risks at stake in attempts to 'culture over' circumcision and ignore its implication in wider rights processes.

It is our purpose in this Special Issue to recover and explore in deeper texture some sense of this new cultural dispensation, particularly as it focuses our attention on the political and jural pressures brought to bear upon pan-African rights processes.

## Notes

1. The project team was led by principal investigator, Lotte Hughes, and comprised research associates Zoe Cormack and Mark Lamont (who replaced Cormack in September 2016), research assistant Nicola Stylianou, consultants Harriet Deacon, Steve Ouma Akoth and Gordon Omenya, and project administrator Heather Scott (until October 2016 when Marie-Claire Leroux replaced her). We also worked closely with John Harrington and Celia Nyamweru, contributors to this Special Issue, whose research interests chimed with ours. Both scholars also contributed generously to events and shared their rich knowledge and insights throughout the study, for which we warmly thank them.
2. This was the subject of a case study carried out by two team members, Mark Lamont and Gordon Omenya (2017), who co-wrote a briefing report based on it.
3. Widespread violence broke out following the election result in December 2007. Victory was claimed by the incumbent president, Mwai Kibaki, and challenged by the opposition led by Raila Odinga. The ensuing crisis and violence left more 1,100 Kenyans dead and around 600,000 people displaced (Mueller 2014; other sources differ on figures). The repercussions are still being felt. More recent elections (two in 2017) have also been characterised by violence, much of it perpetrated by police against opposition demonstrators.
4. Much of this sub-section draws on Ghai & Ghai (2011).
5. 'What we need to understand about hate speech', Jill Cottrell Ghai, *The Star* 13 August 2016 <[http://www.the-star.co.ke/news/2016/08/13/what-we-need-to-understand-about-hate-speech\\_c1401178](http://www.the-star.co.ke/news/2016/08/13/what-we-need-to-understand-about-hate-speech_c1401178)> (accessed 30 March 2017).
6. See <<http://unesdoc.unesco.org/images/0012/001271/127162e.pdf>> (accessed 3 March 2018).
7. The other themes were Dignity and Justice, Development, Environment, Gender, and Participation.
8. Resolution 10/23 of the Human Rights Council, March 2009.
9. The oft-quoted number of 42 'tribes' was in 2017 officially increased to 44, with the addition of Kenyan Asians and the Makonde community.
10. See for example 'Kenyans say no thanks to national dress', Jeevan Vasagar, *Guardian* 25 October 2004 <<https://www.theguardian.com/world/2004/oct/25/kenya.jeevanvasagar>> (accessed 30 March 2017).
11. Kenya National Assembly Hansard, 12 April 1989.
12. Bomas of Kenya, Nairobi, presents daily cultural performances that largely target local school-children and foreign tourists. It has been described as a place where 'national cultural heritage [is] presented ... as a series of ethnic snapshots conveyed through dance, song and music-making' (Hughes 2014: 192).
13. These issues came into sharp focus in early 2018 with a lawsuit brought by a Kenyan medical doctor (*Dr Tatu Kamau v the Attorney General and the Anti-Female Genital Mutilation Board*). She claims 'adult willing women' should be able to practise FGM as their cultural right, also that the Prohibition of FGM Act 2011 is unconstitutional and should be revoked. The case is ongoing at the time of writing (March 2018).

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